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Supreme Court of the United States

October Term, 1949.

No. 163.

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs-Petitioners,

v.

THE UNITED STATES,
Defendant-Respondent.

BRIEF OF PETITIONERS IN REPLY TO THE UNITED STATES.

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IN THE

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OCTOBER TERM, 1949.

No. 163.

COMMODITIES TRADING CORPORATION, *et al.*,
Petitioners,

v.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Brief of Petitioners in Reply to United States.

Opinion Below.

The opinion of the Court of Claims (R. 23-30) is reported at 83 F. Supp. 356.

Jurisdiction.

The judgment of the Court of Claims was entered on April 4, 1949 (R. 30-31). The petition for a writ of certiorari was filed on July 5, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

Questions Presented.

The ultimate question is of course whether the Court of Claims erred in failing to award Petitioners 22 cents per pound for the Whole Black Pepper requisitioned from them, as stated by Respondent.

However, this ultimate question depended upon several other questions, such as whether the market price in India of Black Pepper delivered in New York (Spec. Fdg. 23, R. 21), or the "retention value" (Spec. Fdg. 25, R. 22; Spec. Fdg. 17, R. 18) or the value of black pepper in 1944, if there had been no War (Spec. Fdg. 9, R. 16; Spec. Fdg. 26, R. 22-23), or each of four other questions, was a measure of just compensation.

An affirmative answer to any one of these questions would have required an affirmative answer that the Court of Claims *had* erred in failing to award 22 cents per pound. These matters can all be considered upon the findings alone and are all broad issues in the field of eminent domain.

A pure question of law is presented by the finding of the Court of Claims that only 15 cents a pound was the fair value of the pepper requisitioned and its conclusion and judgment awarding only that amount (R. 23) in the face of the subordinate findings above referred to that required the allowance of the full amount of 22 cents demanded in the complaint (*United States* v. *Esnault-Pelterie*, 303 U. S. 26, 30, 31).

Moreover where the undisputed evidence presents an issue of law and of broad importance which this Court should determine, petitioners submit that one cannot be deprived of his right to have this Court pass on such issue because the Court below has failed to make the proper findings or has made findings contrary to the evidence.

In the case of *United States* v. *Esnault-Pelterie*, 303 U. S 26, *supra*, the Supreme Court, speaking concerning the scope of review of the Supreme Court upon certiorari to the Court of Claims, said:

> "We are not unmindful of the rule that where, with all the evidence before the court, it appears that no substantial dispute of fact is presented, and

that the case may be determined by a mere comparison of structures and extrinsic evidence is not needed for purposes of explanation, or evaluation of prior art, or to resolve questions of the application of descriptions to subject-matter, the questions of invention and infringement may be determined as questions of law.' *Heald* v. *Rice*, 104 U. S. 737, 749; *Singer Mfg. Co.* v. *Cramer*, 192 U. S. 265, 275; *Sanitary Refrigerator Co.* v. *Winters*, 280 U. S. 30, 36."

To be on the safe side, these Petitioners presented all seven of the broad questions which they considered were present in the case (Petition for Certiorari, pp. 3-4) and specified as errors all of the instances where they considered that the Court of Claims had made findings against the undisputed evidence, or had failed to find in accordance therewith.

As stated in Petitioners' Brief in Support of its Petition, page 67, there were no contradictions of Petitioners' evidence.

The Statute Involved.

The pertinent portions of the Requisitioning Act are set out in the Petition (p. 30), also in the Government's Petition in case 156.

Statement.

The Government relies in this case on the statement made by it as petitioner in case No. 156. That statement was criticized in the answering brief in that case of these parties, Petitioners here, Respondents there, and reference is made to such criticism (see Brief of Commodities Trading Corp., *et al.* in case No. 156, pp. 1-9). The facts are

fully and accurately set forth in the statement in the Petition of these Petitioners in this case (pp. 1-11; 38-49).

That statement showed that the facts *found* by the Court of Claims justified and required the award to Petitioners of 22 cents per pound for their pepper, but it also showed that there were many other uncontradicted facts in the record which the Court of Claims did not find and which also supported such an award.

Petitioners have a right to refer to uncontradicted evidence in support of their argument (*United States* v. *Esnault-Pelterie*, 303 U. S. 26, 30, 31). But the findings alone are sufficient to present broad issues of law.

Argument.

These Petitioners consider that the situation is just the reverse of that stated in the opening of the Government's argument at page 4.

As stated above under "issues presented" a pure question of law is presented by the finding of the Court of Claims that only 15 cents a pound was the fair value of the pepper requisitioned, and its conclusion and judgment awarding only that amount (R. 23) in the face of subordinate findings that required the allowance of the full amount of 22 cents demanded in the complaint.

This Court said in *United States* v. *Esnault-Pelterie*, 303 U. S. 26, *supra*, at page 31:

> "We may, of course, inquire whether the subordinate or circumstantial findings made by the court below necessarily override its ultimate findings of fact and show that the judgment in point of law is not sustainable."

Thus, the Court finds the market value of Indian Pepper delivered in New York in May, 1944 (Spec. Fdg. 23, R. 21) (discussed *infra*, pp. 9 to 12), retention value (Spec. Fdg. 25, R. 22; Spec. Fdg. 17, R. 18) (discussed

infra, pp. 15 to 17) imitation pepper with a ceiling price of 16 cents per pound, only one-quarter of which or less was real pepper (Spec. Fdg. 18, R. 18-19) and several other bases for just compensation, each one of which would require an award of the full amount demanded in the complaint. These are all discussed *infra*, pages 3 and 17-18. But, in the face thereof, the Court of Claims awarded only 15 cents per pound. This is explained in its opinion in which it says (R. 27):

> "Taking into consideration * * * and also these sales at 10¢, at 14.19¢ and at 16¢, we conclude that 15¢ a pound is just compensation."

No one of said matters referred to in the above quotation was relevant to reduce Petitioners' compensation below the 22 cent price.

The sale in Puerto Rico was not much more than 1% of Petitioner's holdings. It did not take place until June, 1945, more than a year after the requisition here in question (Spec. Fdg. 20, R. 19). The circumstances of the sale are not shown anywhere. The fact of the sale was proven by Petitioners in order to show that there was an outlet for their Black Pepper at a price more than twice the ceiling price of 6½¢ and they showed that the provisions of Regulation #52, so far as sales to Puerto Rico, Hawaii and Alaska were concerned, were the same in May, 1944 as they were in 1945, and that therefore Petitioners had had an opportunity to make such sales in May, 1944 (Compare Reg. #52 in effect May, 1944 with amendment of October, 1944 in effect June, 1945).

It does not appear what pressure was put upon Petitioners to make this sale, nor any of the circumstances thereof. On the other hand, the President of Commodities testified that no sales had been made willingly (Tr. 31, 33, 36).

Neither should the sales at 10¢ have been given effect by the Court of Claims. In addition to the statement of the President above referred to, we have with respect to these sales the fact that the Government was exercising great, and we submit, improper pressure upon Commodities to force it to sell. That it should have sold a portion of its holdings and lightened its load, under these circumstances, is no proof of the price at which a willing seller would have sold to a willing buyer nor of *just* compensation. Instances of the pressure referred to are as follows:

(1) Seizing Commodities' pepper without *any* payment, in violation of Public Law 274, 77th Cong. approved October 16th, 1941, Chap. 445, as amended (see Petition for Certiorari, p. 30; Complaint, R. 1-4; Spec. Fdgs. 4 and 7, R. 13, 14).

(2) The attempt by the Government to requisition practically all of Petitioner's pepper for civilian use.

It is true that Plaintiffs had obtained a temporary injunction against this procedure and had defeated in the United States District Court for the District of Columbia, a motion for summary judgment by the Attorney General (Tr. 206-208) upon the ground that the statute did not authorize the requisition in question. But that action was still pending. It was War-time and a defeat anywhere along the line would have meant the loss of the pepper.

(3) The O.P.A. had broadcast a distorted and misleading statement of the cost of Petitioner's pepper and had thereby made it appear that Petitioners were grasping, war-profiteers, who were trying to collect two or three times the cost of their pepper (Respondent's Ex. 3, Tr. 199, 165-169).

(4) There was a great shortage of pepper and pickle manufacturers and others who required pepper for their product were undoubtedly suffering (Defendant's Ex. 5, Tr. 217-224).

It seems most unfair that in the circumstances stated above an agreement made by Commodities with O.P.A. and later carried out to sell a substantial part of its pepper at 10¢ a pound if O.P.A. would increase the ceiling price to that figure, should be used as a factor in reducing the allowance for just compensation for a requisition made nearly six months previously (Spec. Fdg. 19, R. 19).

Other Instances of Broad Issues of Law in the Field of Eminent Domain.

The record presents the broad question of the right of an owner of non-perishable property, which it is practical to retain for months or years and until the end of Governmental, Price Control, to a so-called "retention value" as the measure of just compensation (Spec. Fdg. 25, R. 22, pp. 58-60 brief in support).

Another broad question presented is the effect upon the determination of just compensation of a free market in a foreign country where large supplies were available for importation into the United States and where such importation and a market in the United States is prevented only by the refusal of O.P.A. to admit the foreign supplies in face of scarcity in the United States and a drain upon its small holdings to supply South America (Spec. Fdg. 23 R. 21 and brief in support of petition, pp. 60-62).

That situation is just the opposite of the ordinary one where there is no market in the United States because additional supplies are unobtainable.

In the case of black pepper there were governmental restrictions on exportation and prohibition against importations (O.P.A. Price Schedule No. 52; Spec. Fdg. No. 23, R. 21).

Further, the issue whether the Court of Claims could fix a price for Commodities' pepper lower than it could have obtained therefor in the United States in May 1944, if there had been no War (Spec. Fdg. 26, R. 22-23) is another broad general question in the field of eminent domain (see pp. 44-45 in Brief in Support of Petition).

Another broad question is the effect upon the amount to be allowed as just compensation for a requisitioned commodity of the fact that it could be easily and cheaply transformed into a substance, the ceiling price for which would yield a net return more than four times that obtainable by sale of the commodity in its natural state at the ceiling price therefor, and more than the amount asked in the Complaint (Spec. Fdg. 18, R. 18-19 and pp. 64 to 65 of Brief in Support of Petition).

Furthermore, the exclusion from evidence of the affidavits of the Government's officials and employees with respect to pepper, filed by the Attorney-General in opposition to Commodities' injunction suit, and the refusal of the Court of Claims to make Findings of the Facts set forth in said affidavits (Tr. 188-194, 204-5) raises a broad question as to how far statements made by officials or employees of the Government in their official capacities are admissible as admissions against interest.

Again, there is the question whether, in fixing just compensation, which is an equitable proceeding, the Government which has over requisitioned can hold the owner of a requisitioned property to 6½¢ cents per pound therefor or even 15¢, while selling back to him a percentage of the requisitioned property at 75 cents per pound (Tr. 182-186; 215-216).

The criticism at the bottom of page 4 of Respondent's Brief is unfounded. The *findings* of the Court of Claims present the questions which Petitioners seek to have this Court answer. In many instances, the evidence was somewhat stronger than the findings, and in some instances, the Court of Claims found contrary to the evidence, and in other cases it refused or omitted to find in accordance with undisputed evidence. In order to be safe, and to avoid the claim upon the argument before this Court, if this Petition be allowed, that any question was not properly raised, Petitioners assigned error in every case in which the findings of the Court of Claims did not follow the evidence. Petitioners do not, of course, claim that each of these Assignments of Errors constitutes a broad question which this Court should review, but it does contend the seven factors showing value raise broad issues in the field of eminent domain, and that it was safe practice, if not required practice, to assign all of the errors which Petitioners did assign.

Market Price of Indian Pepper Delivered in New York Was a Fair and Tangible Basis for Fixing Just Compensation.

(*Replying to Respondent's Page 5.*)

The situation with respect to black pepper held in India was a most extraordinary one. There was a great unfilled demand for pepper in the United States. In pursuance of our Good Neighbor Policy, we were shipping some of our inadequate supplies to South America and other places. But O.P.A., in the face of all this, refused to allow 20,000,000 pounds of Indian Pepper set aside for the United States by the Joint Food Board to be imported at a reasonable price and used here! (Tr. 9-11, 120-123; Spec. Fdg. 23, R. 21).

Thus, the Court of Claims found:

"15. * * * Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders * * *" (R. 18).

"14. Notwithstanding the foregoing measures taken to conserve this country's supply of black pepper" (orders reducing to 40% of normal the allowable consumption of pepper in the United States), "the inventory in the hands of importers had been reduced" (from 100,000,000) "to about 28,000,000 pounds on September 30, 1943, of which approximately 17,000,000 pounds were held by Commodities * * *" (R. 18).

"16. There was connected with the Office of Price Administration a board of advisers relating to commodities. The board of advisers for spices, including pepper, composed of leading men in the pepper industry, importers, brokers and dealers, recommended that the ceiling price for pepper be increased; that the trade would be able to keep this commodity on what it believed would be a fair level of between 20 and 30 cents per pound; that if the prices were kept at the original levels of 6.5 or 6.75 cents per pound the market would be apt to rebound to a much higher level as of the date of decontrol" (R. 18).

"17. After the removal of ceiling prices in August 1946, an active market in Lampong whole black pepper came into existence. Such pepper was sold in quantity at 50 to 60 cents a pound and upward; and at 40 cents a pound and upward for future delivery in 3 or 4 months" (R. 18).

In Finding 23 (R. 21) the Court finds that there was an active market in black pepper in India and that the price delivered in New York, insurance and freight paid, was 20 cents* in May 1944, and concludes its finding as follows:

> "However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, *i. e.*, 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper."

The situation here presented is just the opposite of the usual situation of scarcities in time of War. Usually there is a lack of an adequate supply due to inadequate production or supply on hand plus the amount which can be purchased abroad and imported. Here, however, the scarcity of pepper in the United States was caused deliberately by the O.P.A. There were 20,000,000 pounds of pepper available for immediate importation into the United States (Fdg. 23, R. 21 and 22). This pepper would have been brought into the United States and there would have been a reasonable market in the United States at a reasonable price, at 20 to 30 cents per lb. (Fdg. 16, R. 18) had it not been for the deliberate prevention of this importation by O.P.A. (Fdg. 23, R. 22).

Can the Government prevent trading and a market in the United States and then reject the prices in India which would have prevailed here as evidence of value?

The statement of Respondent, at page 5 of its brief, that Indian Pepper was not actually imported into the United States is not correct. True, it was not imported

*This is a typographical error and should be 21 cents.

in the year 1944, but in 1945, the O.P.A. permitted the Commodity Credit Corporation to buy 300 tons of Indian Pepper and pay the full market price of 23½¢ per pound (Tr. 21 and 22). This was enough pepper to supply every man, woman and child in the United States with the average consumption for a fortnight (Tr. 26).* That pepper was sold by Commodity Credit Corporation to exporters in New York (the classification in which Commodities Trading Corporation was placed), and was sold by them to South America for as much as $1.00 a pound. All with the permission of O.P.A. (Tr. 21-23). There was no change of conditions between 1944 and 1945 (Tr. 23-24).

In addition the Army recognizing the impropriety of making requisitions against the short supply in the United States while there were large untouched supplies available in India, arranged to purchase through Commodity Credit Corporation many hundred tons of this Indian Pepper, which it handed over to the grinders in the U. S., who ground it and packed it in regulation packages for the Army (Tr. 24, 25). That pepper was bought by the grinders at between 21¢ and 23¢ a pound (Tr. 22-24). Finally, at the end of the War, and during control, several hundred tons of this Indian pepper was brought into the U. S. by the Department of Agriculture, which permitted grinders to buy the pepper and to sell it for civilian consumption in the U. S. That privilege was restricted to grinders (Tr. 24-25).

Thus there was an actual market in the United States at 21 to 23 cents in 1945 and thereafter.

Petitioners submit that in such case, the price at which pepper could have been imported and sold in the United States in May 1944 is the minimum amount to allow for just compensation.

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*NOTE 650,000 Lbs. x 52 weeks x 8 equals 270,400,000 Lbs.

Imitation Pepper.

(Replying to Respondent's Page 6.)

Respondent is correct in its statements with regard to the fact that imitation pepper was a new business and that the ceiling price was fixed on a different basis from that fixed for actual pepper under Regulation 52. It is also true that the record does not show that Petitioner ever engaged in the business, but these facts by no means detract from the importance of the ceiling price of 16 cents for that product.

The fact that there was an outlet for pepper in great quantities that would return net about 30 cents per pound after the cost of grinding, packing and purchasing the neutral adulterants (Spec. Fdg. 18, R. 18-19, Petitioners' Brief in Support, pp. 64-65) is certainly a matter of great weight in determining what the value to Commodities of its pepper was at that time—1944.

Respondent says in the note at the bottom of page 6 that the record does not show that Commodities *could* actually have engaged in that business.

But as Respondent says, this was a new business and there seems to be no reason why Petitioners, American citizens, should not have been permitted to engage therein, if they so desired. On the record it must be assumed that they did have the right to engage therein. Petitioners, having proven the business and the ceiling price, it was Respondents' duty to prove that they could not engage therein if that were the fact.

How would an American citizen go about proving his right to engage in a business? Moreover, does not the mere fact that the same article (Whole Black Pepper) could be used in sales generally to the American public by American merchants or dealers in such manner as to yield a net return of 30 cents a pound, make claims of a value of 6½ cents, or even 15 cents, look absurd?

Petitioners' Claims With Respect to the Price of Whole Black Pepper in May 1944, Had There Been No War, Are Fully Supported by the Evidence.

(*Replying to Respondent's Pages 6-7.*)

Respondent's statement with respect to this matter is not correct. There was a most abnormal price of pepper in 1927, 1928 and 1929 (see Chart, R. 16). This produced abnormal planting and a few years later abnormal production (Spec. Fdg. 26, R. 22). This abnormal production caused the lowest prices known to history. These low prices put a stop to new planting and to the proper care of many existing pepper gardens. As a result thereof, the crop in 1941 had fallen off 40% from the crops of previous years (Tr. 139-140) and the Court of Claims found:

> "If there had been no War in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when new plantings would have begun to bear. This decreased supply during the period 1942 to 1945 or 1946 would have had effect in raising prices in the United States" (Spec. Fdg., pp. 22-23).

On the basis of this, experts testified to the extent to which it would have risen by May 1944.

Respondent's criticism of Petitioners' theory and evidence as to what would have happened if there had been no War is unfounded.

There is nothing inconsistent with Petitioners' theory in the fact that pepper prices did not begin to rise until 1941. There had been an abnormal production for several years prior to that year (Tr. 140). This had to be disposed of. 1941 was the first year when the cessation of planting and the neglect of the pepper gardens had had effect. That year's production was 40% less than those of previous years (Tr. 140-141). And the price that year went up from 4.1 cents per pound in January to 6¾ cents per pound by December 7th (Spec. Fdg. 9, R. 15).

But Petitioners' theory presupposed no War. There was a War and the approach of that War caused dislocations and delayed an advance in price, which would probably have taken place earlier. Under normal conditions there would have been no attack on pepper buyers and holders by Mr. Leon Henderson in 1941, no fourfold increase in the margin on contracts for the delivery of pepper, pursuant to his demand, and no dumping on the New York market of their holdings by the War-frightened Sumatrans (Tr. 162, 164, 165). These factors, which did occur in 1941 of course, retarded and delayed the increase in the price of pepper. But we are dealing here with what would have occurred in and prior to May 1944 had there been no War. The history of pepper is that when the price begins to rise due to a scarcity, it rises with great rapidity (see Graph found by the Court of Claims, in its 9th Finding, R. 16). That shows that the last time prior to 1942 when there was a shortage of pepper, the price shot up from approximately 8¢ a pound in 1924 to 33¢ a pound in 1926, and to 40¢ in 1928. There is no sales resistance to purchases of ⅛ lb. per year of a commodity whether the price be 6¢ or 60¢ per lb. Petitioners submit that no one can look at the said chart in Finding 9 and fail to believe that with the known cessation of planting and neglect of gardens which had taken place from 1936 to 1942, due to the abnormally low prices, pepper would have shot up to more than 20¢ a pound by May, 1944. Evidence of a well qualified expert showed that this would have happened (Tr. 99, 100).

Retention Value Is a Fair and Reasonable Measure of Just Compensation for Non-Perishable Easily Stored Property Which Has Been Requisitioned.

(*Replying to Respondent's Page 9.*)

Respondent says of retention value:

> "Such a value does not represent what a willing buyer would pay in cash to a willing seller in a fair market" (Respondent's Brief, p. 9).

That is precisely what it does represent. What a willing buyer at the end of the War and at the end of control will pay to a willing seller after normal conditions have been restored and price control has been removed.

Retention value does not violate the fundamental principle that just compensation is to be determined at the time of taking, as contended by Respondent at page 8 of its Brief.

Retention Value is the value at the time of taking, based upon reasonable probabilities as to the future and as to what the conditions will be at the time of decontrol. It is by no means the actual price which has followed decontrol. On that basis, Petitioners would have received an award of 50 to 60 cents per pound instead of 15 cents (Spec. Fdg. 17, R. 18).

Retention value does not reflect the extreme scarcity resulting from being cut off by the War from foreign sources of supply. On the contrary it is measured by the conditions which will exist when that scarcity has ceased, and normal conditions have been so far restored that price control is ended.

That the Court of Claims had the above conception of retention value and not the fantastic one stated by Respondent is clearly shown by its opinions in *Kaiser* v. *United States*, 69 Fed. Supp. 555, and *Pantex Pressing Machine* v. *U. S.*, 71 Fed. Supp. 859.

Respondent at page 9 of its brief makes the statement that this Court in the *Cors Case* (*U. S.* v. *Cors*, 337 U. S. 325) said "retention value" was "a hold-up value, not a fair market value."

This is a gross distortion. "Retention value", so-called, was not in the case at all, and in the above quoted statement the Court was speaking only of the *enhancement* in the value, of the tugboat requisitioned, caused by the Government's need therefor. Such enhancement in value was called a "hold-up value", and the Court explained: "That is a value which the *Government itself*

created and hence in fairness should not be required to pay."

In the case at bar, the Government had nothing whatever to do with creating or enhancing the "retention value" or any other value of Petitioner's pepper. In fact, its activities, so far as effective, were pointed in the opposite direction.

Petitioners' Cost.

(Replying to Respondent's Page 7.)

Petitioners' cost was found by the Court of Claims, itself, to exceed 12.7¢ per pound by a substantial margin.

While the Court of Claims did find certain factors which added up to 12.7¢ per pound, the very finding in which these figures are included shows that proper elements of cost were excluded.

Thus, the Court says:

> "No interest is computed upon costs for any of the carrying charges, but only on Commodities' original cost."

The money paid for storage over nine years was as much an expenditure as the money paid for the pepper, itself. Interest should have been computed on these large storage charges, as well as on the pepper. Moreover, an allowance of 2.75% per annum for bank interest, commissions, cables, exchange, etc., is clearly inadequate.

The finding of the Court of Claims further stated:

> "The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period the pepper was purchased and held."

Does not "just compensation" require an allowance for these factors either as an addition to out-of-pocket cost or as an allowance for holding the pepper for nine years?

This whole matter was discussed at pages 65 to 67 of Petitioners' brief in support of its petition.

The Cases Cited by Respondent in Nowise Conflict With Petitioners' Contentions and in Fact Support Them.

(*See Respondent's Pages 5-9.*)

Bowles v. *Willingham*, 321 U. S. 503, is cited following this statement by Respondent:

> "Petitioners concede and the Court of Claims found that the Indian Pepper was not actually imported into the United States because of valid restrictions imposed by the O. P. A. and no Indian Pepper was sold here."

The case seems to have little connection with the above or with this case. It is a price control case, but not a taking. The page cited refers to the impossibility of fixing rents individually for each Landlord and holds that because the value of some property is hurt does not make the regulation invalid.

The Court justified rent control because "we are not dealing here with a situation which involves a 'taking' of property", and says:

> "By Sec. 4 (d) of the Act, it is provided that 'nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent.'"

That being the case, it would seem to be true that if the property had been *taken*, the rule would have been different.

Davis v. *Newtown Coal Co.*, 267 U. S. 292, 301, involved a taking of coal and the court said:

> "As announced in *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343, 344, 'where private

> property is taken for public use, and there is a market price prevailing at the time and place of the taking that price is just compensation' to which the owner is entitled. Also, 'the ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

The above in no way contradicts any claim of the petitioners. They do not question the fact that if there is a market at the time and place of taking, such market, in the absence of unusual factors, would measure just compensation.

Indeed, Petitioners urge as the measure of their compensation the market price at the time of taking at the only place in the world where there was a large supply of pepper—millions of pounds—and an active market albeit that market was in India and was prevented from being extended to the United States by the action of O. P. A. (Fdg. 23, R. 21).

On the other hand, the statement of the Court above:

> "The ascertainment of just compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard."

is precisely what these petitioners contend.

Perry v. *United States*, 294 U. S. 330 was a case arising from the reduction of the gold content of the dollar and was a five to four decision. It has no similarity to the case at bar and can be sustained on the basis of the sovereign's control over currency.

Seaboard Air Line v. *United States*, 261 U. S. 299, 306, involved the taking of land under the Lever Act. The case is cited by respondent for the proposition that

retention value violates a fundamental principle that just compensation must be determined at the time of taking. The Court quotes from its opinion in an earlier case that

> "It was the duty of the Government to make just compensation as of the time when the owners were deprived of their property."

The above quotation was used in connection with the Court's holding that the Government should pay interest. However, nothing in the case is contrary to the contentions of these petitioners. The retention value which they claim is the value of their property at the time it was taken (May, 1944), but taking into account that they could have held their property until the end of price control, accepting the costs, burdens and hazards of holding it, but, on the other hand, obtaining what it was reasonable to suppose in 1944 they could have obtained when the War demand and War Restrictions were at an end.

Moreover, this Court pointed out (p. 304 of it sopinion):

> "Just compensation is provided for by the Constitution and the right to it cannot be taken away by Statute. *Its ascertainment is a judicial function.* (*Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312, 317.)"

United States v. *New River Collieries Co.*, 262 U. S. 341, 344, involved the taking of coal for the Navy. The Court said:

> "Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is 'just compensation'."

Had there been such a market, at the time and place of the taking, in the case at bar, there would in all probability have been no requisition because the Government

would have bought and not seized. But the absence of such a market price does not keep out evidence of markets near in time or circumstances. The Court was merely saying that one fact would be conclusive, if it existed, not that all other facts were irrelevant or immaterial.

In that case, the Government tried to show everything else but market value, and to no avail.

There does not seem to be any connection whatever between *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266 and the case at bar. In that case this Court disallowed certain elements of special value which would exist if the land in question were united with other properties not owned by the party whose land was taken. Of course, value is all that one whose property has been taken by the Government is entitled to receive and there is nothing to be added to that value. However, where there is no market and value is difficult of ascertainment, cost has been used as a basis of just compensation. There is nothing in the *Powelson* case contrary to petitioners' claims that something should be allowed to them over and above out-of-pocket expenditures, for their gratuitous services in holding this pepper and managing this business for nine years, be such allowance for gratuitous services or for profit over and above out-of-pocket expenses.

In *United States* v. *Miller,* 317 U. S. 369, the United States condemned a strip of land in connection with a reclamation project. The point in dispute was whether just compensation should be the value of the land at the date when actually taken, or at the date when the United States was committed to the project, the land having been increased in value by the project.

On this point, the Court said:

> "The question, then, is whether the Respondent's lands were probably within the scope of the

> project from the time the Government was committed to it. If they were not but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the Respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Governmen. ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities."

The decision in no way conflicts with any claim of these Petitioners.

Indeed, the Court in that case went farther than Petitioners ask it to go in this case.

Petitioners make no claim here for any value which was created directly or indirectly in any way by the Government's necessity or by its actions.

However, the Court, in defining "just compensation" says:

> "Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

Conclusion.

The petition for certiorari made by plaintiffs should be granted.

New York, New York, October 20, 1949.

Respectfully submitted,

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